evidence and to discriminate where it finds judicial discrimination to be warranted. The demonstration would of course be more impressive had the result not been reached by so narrow a margin.

It must not be forgotten, in judging the correctness of the decision, that the ultimate result of the efficient competition which the law seeks to foster may appear superficially much like the result of the monopoly which it prohibits. A number of facts which appear to have been established, such as the continual efforts of the United Company to improve its product by constant experiment and large expense, its policy of giving its customers the benefit of these improvements without additional charge, the testimony of the witnesses to the excellence of its service, the lack of any substantial proof of unreasonable rates or charges, the repeated refusals to buy competing businesses or patents, much more numerous than the acquisitions actually made, the high level of efficiency constantly maintained, and the fact that so far as competition with patented machines is possible there has always been competition, tend strongly to support the conclusion of the majority of the court that here was a success established by distancing rather than by suppressing competitors, and maintained only by unremitting effort for greater efficiency in the face of actual or possible competition. In these days when we are realizing as never before the value of industrial efficiency, a decision that the law has no quarrel with success so obtained is particularly timely.

TORT AND CONTRACT IN THE MARKETING OF FOOD

It was a dictum in New York which introduced into American law the doctrine that in sales of foodstuffs a dealer always impliedly warrants their fitness for consumption.[1] The question has just come before the Court of Appeals for the first time, and the doctrine has been squarely affirmed, in *Race v. Krum* (1918, N. Y.) 118 N. E. 853.[2] The plaintiff purchased and ate at the defendant's drug store ice cream manufactured by the defendant. In an action for damages for illness caused by the presence in the cream of a filth product, tyrotoxicon, the trial court charged that the defendant impliedly warranted the cream wholesome and fit to eat. The instruction was on appeal held correct.

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[1] See *Van Bracklin v. Fonda* (1815, N. Y. Sup. Ct.) 12 Johns. 468.

[2] Discussed (1918) 16 MICH. L. REV. 555; the problem involved is also considered in (1908) 15 L. R. A. (N. S.) 884. The present comment deals wholly with liability to the *consumer* of food intended for human beings. See also (1914) 48 L. R. A. (N. S.) 213, 219; and on the more general relations of the topic, *ibid.* 213, and (1909) 19 *ibid.* 923.

The court expressly distinguishes the case from that of an innkeeper or restaurateur. These latter have been held not to warrant because they do not sell; they merely set before a guest food, to which title does not pass, but which the guest in return for his money receives the privilege of consuming on the spot so far as he desires to.[3] On the soundness of this doctrine the court refuses to pass; in the instant case, it finds a clear sale. Yet it is hard to see wherein the serving of ice cream over the counter of a drug store differs in this respect from the serving of ham and eggs at a lunch counter. But without further regard to whether or not such cases do in fact and general understanding constitute sales, it is submitted that the existence of an implied warranty need not be conditioned on the existence of a strict sale. Implied warranties rest either on an attempt to interpret the parties' true mutual understanding, or on public policy; the warranty of wholesomeness of food belongs to the latter class.[4] The considerations of policy which attach that warranty of wholesomeness to the sale of meat to a consumer in the market[5] apply with equal force to the serving of meat to a guest in a hotel; if anything, they are stronger, because the guest has less opportunity than the ordinary purchaser in the market to discover defects in food

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[3] *Merrill v. Hodson* (1914) 88 Conn. 314, 91 Atl. 533, criticized (1914) 24 YALE LAW JOURNAL, 73, where two criminal cases are cited which held such serving to be a sale. See also (1917) 27 YALE LAW JOURNAL, 140. What the true relations of the parties are in such a case is something of a problem. Certainly title does not necessarily pass to all the food; the guest may reject part; it is part of the contract that the innkeeper will dispose of all the guest may leave. But suppose the latter desires to take some of the food to his room to eat later—fruit, for example. Or suppose a pearl is found by the guest in oysters served on the half-shell. It has been suggested that the situation may be different in a hotel dining room or conventional restaurant on the one hand, and in a self-serve dairy-lunch on the other; or even different according to whether service is *table d'hôte* or *à la carte*. *Cf. Valeri v. Pullman Co.* (1914, S. D. N. Y.) 218 Fed. 519, 521; but *cf.* also the seeming facts in *Leahy v. Essex Co.* (1914, N. Y.) 164 App. Div. 903, 148 N. Y. Supp. 1063. Perhaps there might also be a difference as to kinds of food. The test may well be found in an attempt by the server of food to revoke and retake possession before the food is consumed.

[4] "The consequences resulting from the purchase of an unsound article may . . . prove so disastrous to the health and life of the consumer," etc. "The vendor has so many more facilities for ascertaining the soundness," etc. *Wiedeman v. Keller* (1898) 171 Ill. 93, 99, 49 N. E. 210, 211. *Cf.* on the related question of the public policy back of criminal regulation of sales of food (1916) 26 YALE LAW JOURNAL, 67; and (1917) *ibid.* 416; also (1918) 27 *ibid.* 961; and see a suggestive discussion by Hand, J., in *Valeri v. Pullman Co., supra.*

[5] *Rinaldi v. Mohican Co.* (1916, N. Y.) 171 App. Div. 814, 157 N. Y. Supp. 561 (warranty of retailer); *Catani v. Swift and Co.* (1915) 251 Pa. 52, 95 Atl. 931 (warranty of manufacturer to consumer for goods resold in the original package).

set before him. Why cannot the warranty be attached to the sale of a privilege of consuming food[6] as well as to the sale of the food itself?

The common law history of this warranty doctrine, indeed, is almost wholly one of extension. It is based, ultimately, on a statement in Blackstone that "in contracts for provisions, it is always implied that they are wholesome."[7] But Blackstone's exception to *caveat emptor* rested in no wise on warranty, but on ancient criminal statutes;[8] the predication on it of the warranty doctrine, by a multitude of *dicta*,[9] and then by decided cases,[10] seems a case of growth by mistake.[11] Mistake or no, however, it is established law to-day, and the principal case, resting on it, reaches a sound result.[12]

For all that, the doctrine of warranty is not sufficient unto the needs it has been called upon to fill. For while a warranty protects only those "privy" to it,[13] the public policy on which the warranty rests demands protection of all consumers of foodstuffs. There have been heroic attempts to make the means meet the situation; it has been

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[6] The meaning of such a transaction seems to be that the innkeeper, for a money or credit consideration, extinguishes in himself certain rights in the food and creates in the guest certain others; the essential relation involved is a privilege in the guest to consume the food—a privilege which, though perhaps not transferable, is almost as valuable as the complete ownership. This may fairly be called a sale of a portion of the title to the food; for sale of the whole title, *i. e.*, of the food, is only the same operation applied to *all* the legal relations of which that title is made up.

[7] 3 *Bl. Comm.* *165.

[8] Benjamin, *Sales* (7th ed.) sec. 672; Williston, *Sales*, sec. 241; *Burnby v. Bollett* (1847, Exch.) 16 M. & W. 644.

[9] 2 Mechem, *Sales*, sec. 1356; 11 *R. C. L.* 1120; 15 *Am. & Eng. Enc. Law* (2d ed.) 1238; and cases cited.

[10] *Hoover v. Peters* (1869) 18 Mich. 51; *Sinclair v. Hathaway* (1885) 57 Mich. 60; *Wiedeman v. Keller, supra*, n. 4; *Sloane v. Woolworth Co.* (1916) 193 Ill. App. 620. In citing these cases it is not always noticed that those in Illinois were decided under a statute similar to that Blackstone had in mind. See *Wiedeman v. Keller, supra*, at p. 99. Indeed the whole matter is frequently regulated by statute. See *Catani v. Swift and Co., supra*, n. 5, at p. 56; *Flessher v. Carstens Packing Co.* (1916) 93 Wash. 48, 53; 160 Pac. 14, 16; and see note 12, *infra*.

[11] See citations *supra*, n. 8.

[12] It is something of a question, however, how far the Sales Act—which, although adopted in New York, is not discussed by the court in the principal case—should be held to have changed this common law rule. The English Sales of Goods Act brings the sale of an article of food, as to implied warranty, within the ordinary rule of reasonable reliance applied to sales of goods generally. 15 *Hals. Laws Eng.* 3; *Frost v. Aylesbury Dairy Co.* (C. A.) [1905] 1 K. B. 608. And the provisions of the American Uniform Sales Act are taken from the English Act. Williston, *Sales*, sec. 248.

[13] See *Ketterer v. Armour & Co.* (1912, S. D. N. Y.) 200 Fed. 322, 323, for this reason rejecting the strict warranty view in favor of liability practically in tort.

said that "a manufacturer, dealer, or other person may bring himself into privity with others under exceptional circumstances, and thereby be charged with a duty toward such person different or greater than that which he owes to" persons in general;[14] the "special circumstances" come down largely to knowledge that certain other persons were intended by the buyer to use the commodity bought,[15]—to a groping part-application of a sort of third party beneficiary rule. No theoretical difficulty appears, indeed, in recognizing warranties for the benefit of third persons;[16] but there is the practical question whether the courts would consciously accept such a doctrine, and just how far they would carry it if they did.

The idea of liability in tort seems simpler and more apt: that every manufacturer and dealer in foodstuffs is under a common law duty to any person who may reasonably be expected subsequently to use those foodstuffs, to use reasonable care to make and keep them wholesome.[17] And so it is very generally held: drugs, and then food,

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[14] *Hasbrouck v. Armour & Co.* (1909) 139 Wis. 357, 363; 121 N. W. 157, 160. This case follows an excellent discussion of the principles involved in food and other cases with the remarkable finding of fact that injury to the hand of a consumer was not a consequence to be expected from allowing a needle to become imbedded and hidden in a cake of soap. Attempts to follow the court in its application of theory to facts have led to regrettable results. See (1917) 27 YALE LAW JOURNAL, 281, criticizing *Jacobs v. Childs Co.* (1917, Mun. Ct.) 166 N. Y. Supp. 798 (nail in cake).

[15] So *Woodward v. Miller* (1904) 119 Ga. 618, 46 S. E. 847, where the defendant manufacturer sold a buggy he knew to be defective to a municipal corporation for the use of one of its employees; and the *Hasbrouck* case, *supra*, so explains *Bishop v. Weber* (1885) 139 Mass. 411, 1 N. E. 154, where a caterer was employed to furnish dinner to a man and his guests; but a later Massachusetts case finds that "there seems to be ground for holding that the declaration in *Bishop v. Weber* was good as a declaration on a contract between the plaintiff and the defendant." *Farrell v. Manhattan Mkt. Co.* (1908) 198 Mass. 271, 286; 84 N. E. 481, 487. The actual writ in the *Bishop* case covered both tort and contract; the decision was only that the action lay.

[16] There seems no reason to question that a warranty may to-day be treated as a contract, whether or no it took its origin in tort. *Cf. Nash v. Minnesota Title Ins. & T. Co.* (1895) 163 Mass. 574, 40 N. E. 1039.

[17] *Ketterer v. Armour & Co., supra*, n. 13; and see *Flessher v. Carstens Packing Co., supra*, n. 10, at p. 56; *Parks v. Yost Pie Co.* (1914) 93 Kan. 334, 337; 144 Pac. 202, 203; *Doyle v. Fuerst and Kraemer* (1911) 129 La. 838, 841; 56 So. 906, 907; *Ketterer v. Armour & Co.* (1917, C. C. A. 2d) 247 Fed. 921, 927. On what difference there may be between the liability of the manufacturer and that of the seller, see note 20, *infra*.

The benefit of this liability in tort extends to the members of the household of the purchaser of food or drink. See *Ketterer v. Armour & Co.* (C. C. A. 2d) *supra*, n. 17, at p. 923. It extends to a casual licensee or guest. *Watson v. Augusta Brewing Co.* (1905) 124 Ga. 121, 52 S. E. 152. It would seem, therefore to cover almost any consumer; but it would probably not be extended to benefit a thief, and possibly not a finder. Liability to one who buys to resell is of course a wholly different question, itself not free from conflict of authority.

have been brought under the ordinary rule of torts as to dangerous instruments.[18] The test of reasonable care serves also to avoid another difficulty of the warranty doctrine at which some courts have balked:[19] that it is absolute. It seems hard, for instance, to hold a retail dealer for damage caused by meat of good appearance, which he chose and kept carefully, and which bore the government stamp.[20]

Compare *Neiman v. Channellene Oil & Mfg. Co.* (1910) 112 Minn. 11, 127 N. W. 394; *Mazetti v. Armour & Co.* (1913) 75 Wash. 622, 135 Pac. 633; and the rule as stated in 15 L. R. A. (N. S.) 884.

[18] (1916) 25 YALE LAW JOURNAL, 679; see also, on the general duty of a manufacturer (1918) *27 ibid.* 961; but see *Farrell v. Manhattan Mkt. Co., supra,* n. 15, at p. 286.

[19] *Bigelow v. Maine Central R. Co.* (1912) 110 Maine, 105, 85 Atl. 396, where it was said that with the changed conditions of modern industry, public policy might no longer impose upon caterer, seller or host the old implied warranty of wholesomeness; that with canned goods, as with other packed and branded food sold in the package, vendor and vendee rely equally on the brand, with no greater opportunity in the former to know the quality of the goods, unless their history or appearance put him on notice. This view as to canned goods appears to be finding approval. See *Flessher v. Carstens Packing Co., supra,* n. 10, at p. 54; but see *Chapman v. Roggenkamp* (1913) 182 Ill. App. 117.

[20] As in the Illinois cases, and as in *Rinaldi v. Mohican Co., supra,* n. 5, despite misgivings. Courts often comment on the severity of the rule, but seem to feel that its general working is nevertheless salutary. If so, the benefits must be found, as with the statute of frauds, not in the litigated cases, but in the regulation of conduct to prevent the question arising.

In the *Rinaldi* case, in *Sheffer v. Willoughby* (1896) 163 Ill. 518, 45 N. E. 253, in the principal case, and often elsewhere, the rule of warranty is phrased to apply to a dealer *who makes or prepares the article* he sells; who is, therefore, a manufacturer; and again, to a *sale for immediate use.* If the latter qualification is intended to exclude liability for the spoiling of goods in the hands of the consumer, its presence is unnecessary; if it is intended to exclude the vendee's purchaser, it is again unnecessary in most instances, as the warranty is rarely—save where the original package rule (note 19, *supra*) is applied to exonerate the dealer—held to enure to the sub-vendee's benefit. The word "consumption" substituted for "immediate use" would be more accurate and less likely to mislead.

The restriction of the warranty to a sale by a manufacturer, it will be noticed, is not in consonance with the passage from Blackstone as read by the courts; it appears to rest on the thought that the opportunity to discover defects which is available to a dealer who does not prepare his food is not enough better than that of his patrons to justify the imposition of any warranty. This hardly holds true in fact. It is submitted that, subject always to the limitation pointed out in note 19, dealer and manufacturer should be on one footing as to warranty of food—as they are in other warranties under sec. 15 (1) of the Sales Act.

The tort obligation likewise would appear to rest on manufacturer and dealer alike. It may seem proper in many cases to hold the manufacturer rather more strictly to account than the dealer; the nicer definition of the standard of care must be left to each court on the facts of each case. *Cf.* note 21, *infra.* Of course a merely casual vendor will rarely be held on either theory. See *Burnby v. Bollett, supra,* n. 8; Williston, *Sales,* sec. 242; but see *Hoover v. Peters* (1869) 18 Mich. 51.

On this point of policy, however, the courts are not agreed;[21] many even of those cases which go off on the tort theory tend to place upon the seller—particularly if he be also the manufacturer—not a mere duty to use due care, but the liability of an insurer of the food sold;[22] a liability even broader than that under the implied warranty, because it extends to any person who may use the food.

The advantages of the tort doctrine, then, over that of implied warranty, are that it is no anomaly, but fits into the general law of the subject; that without danger of uncertainty or mistake it protects all those whom the public policy on which it rests is intended to protect; and—if this be an advantage—that it may easily be applied to impose a duty, not absolute, but tempered by reason.

But between the two theories there is no conflict. If a single one had to be chosen, certainly that of tort would be preferable; but there is no cause to choose a single one.[23] When a man ships goods by a common carrier, relations result which may impose liabilities not only in contract, but in tort as well. If a man under contract to repair something of mine makes a botch of it, he is liable not only in con-

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[21] Even in the cases which rest recovery on negligence the varying strictness of the requirements of proof leads to widely differing results. Some hold that the negligence must expressly be averred and proved. *Sheffer v. Willoughby, supra,* n. 20. Or that evidence tending to show that the plaintiff bought and ate food at the lunch room of the defendant, and had ptomaine poisoning in consequence, was not sufficient to enable the plaintiff to go to the jury on the question of negligence. *Crocker v. Baltimore Lunch Co.* (1913) 214 Mass. 177, 100 N. E. 1078; see also *Ketterer v. Armour & Co.* (C. C. A. 2d) *supra,* n. 17. Certainly the more liberal view in this matter is the preferable. So *Tomlinson v. Armour & Co.* (1908, Ct. Err.) 75 N. J. L. 748, 70 Atl. 314; *Watson v. Augusta Brewing Co., supra,* n. 17; *Doyle v. Fuerst & Kraemer, supra,* n. 17. But it should be noted that this very liberalization of procedure can be made to mean holding the defendant as an insurer. *Cf.* the cases in the following note. The Massachusetts rule appears to be peculiar unto itself: "As due care is no defence when the dealer makes the selection, so there is no liability for negligence when a dealer offers several articles of food for sale from which the buyer is to make his own selection. In offering . . . he impliedly represents that he believes all of them to be fit for food. That is the extent of his liability." *Farrell v. Manhattan Mkt. Co., supra,* n. 15, at p. 286. It is believed that the test of selection is not satisfactory, unless perhaps for warranty alone; as to which it might be justified as an application of the Sales Act. *Cf.* note 12, *supra.*

[22] *Parks v. Yost Pie Co., supra,* n. 17; *Catani v. Swift and Co., supra,* n. 5; *Jackson Coca Cola Bottling Co. v. Chapman* (1914) 106 Miss. 864, 64 So. 791; but see *Crigger v. Coca Cola Bottling Co.* (1915) 132 Tenn. 545, 179 S. W. 155.

[23] The possibility of recovery on either of two theories in cases where, for instance, a dealer himself prepares food and sells it to an immediate consumer, is often recognized and discussed by the courts; which at times—particularly when refusing recovery—distinguish sharply between the two. See *Crocker v. Baltimore Lunch Co., supra,* n. 21; *Hasbrouck v. Armour and Co., supra,* n. 14; and see also *Tomlinson v. Armour and Co., supra,* n. 21. On the other hand, some courts would merge the theories. See *Flessher v. Carstens Packing Co., supra,* n. 10.

tract for failure properly to perform, but in tort for misdoing.[24] And so in the situation under discussion, there may well be two liabilities, each with its own content. That New York has chosen to affirm the doctrine of implied warranty of wholesomeness is no cause for reproach—if only she does not for that reason disaffirm the rule of liability in tort.

FOREIGN CORPORATION TAXES AND INTERSTATE COMMERCE

The decision of the Supreme Court in the recent case of *International Paper Company v. Massachusetts* (1918) 38 Sup. Ct. 292, is of importance in that it reaffirms in the broadest language the doctrine laid down in the earlier case of *Western Union Telegraph Company v. Kansas*,[1] which there was reason to think had been considerably narrowed by later cases.

It will be remembered that in the *Western Union* case the court decided that a license fee imposed upon a foreign corporation for the privilege of doing local business and based upon a given per cent of its entire authorized capital was unconstitutional. It held that such a fee was necessarily "a burden and tax on the company's interstate business. . . . Such is the necessary effect of the statute, and that result cannot be avoided or concealed by calling the exaction of such a per cent of its capital stock a 'fee' for the privilege of doing local business."

The Western Union was a corporation engaged in interstate commerce, and its interstate business was so intimately connected with its intrastate business that they could not be separated as an economically sound business proposition.

Later decisions of the court, upholding statutes differing somewhat from that in question in the *Western Union* case were thought to limit the broad doctrine laid down in that case.[2] This was particularly true of the case of *Baltic Mining Company v. Massachusetts*.[3] In that case the court held constitutional a tax which was imposed for the privilege of doing local business and based upon the total authorized capital, but with a maximum limit of $2000. This act had been construed as not applying to corporations whose sole business was interstate commerce or which carried on interstate and intrastate business in such close connection that the intrastate business could not be abandoned without serious impairment of the interstate business of the corporation.[4] The Baltic Mining Company was

[24] (1917) 26 YALE LAW JOURNAL, 486.

[1] (1910) 216 U. S. 1, 30 Sup. Ct. 190.

[2] See cases cited in the principal case.

[3] (1913) 231 U. S. 68, 34 Sup. Ct. 15.

[4] See *Baltic Mining Co. v. Commonwealth of Massachusetts* (1911) 207 Mass. 381, 93 N. E. 831, at end of opinion.